

CHAPTER 173
ADMINISTRATIVE HEARINGS
[Prior to 7/29/87, Health Department[470] Ch 173]

641—173.1(17A) Scope. This chapter shall govern procedure in all contested cases and permit or license denial, revocation, suspension, and renewal proceedings not otherwise provided for and includes but is not limited to:

173.1(1) Denial, suspension, or revocation of a migratory labor camp license under authority of Iowa Code section 138.7.

173.1(2) Denial of the issuance of a disinterment permit under authority of Iowa Code section 144.34.

173.1(3) Hearing concerning advertising under authority of Iowa Code section 151.7 with review by the board of chiropractic examiners in lieu of the director.

173.1(4) Denial, suspension, or revocation of a hearing aid dealer license under authority of Iowa Code section 154A.24 with review by the board of examiners for the licensing and regulation of hearing aid dealers in lieu of the director.

This rule is intended to implement Iowa Code section 10A.202 and chapter 17A.

641—173.2(17A) Requests for hearings. All requests for hearings shall be submitted in writing by certified mail, return receipt requested, to the Iowa Department of Public Health, Lucas State Office Building, Des Moines, Iowa 50319-0075.

This rule is intended to implement Iowa Code section 10A.202 and chapter 17A.

641—173.3(17A) Notice of hearings. Notice of the hearings shall be prepared by the administrative law judge in the form of an order and be mailed by restricted certified mail, return receipt requested, to the person requesting the hearing or an alleged violator at least ten days before the date of the hearing.

641—173.4(17A) Informal settlement. The administrative law judge may, upon the officer's own motion or the request of any party to the hearing, hold prehearing or posthearing conferences for the purpose of settlement of the matter or for facilitating the hearing or decision of the administrative law judge. Notice shall be given to the parties of the time and place of such conference and the purpose therefor. A record shall be made of all agreements and actions resulting from any such conference. The administrative law judge may issue an order setting forth all such agreements and actions. The matter may also be resolved by consent order approved by the administrative law judge. Absent objections of the parties, such agreements and actions at the conference shall become part of the hearing record and be binding upon all parties. The matter may be resolved during the informal conference. A settlement approved by the administrative law judge is binding upon the parties.

641—173.5(17A) Remand prior to hearing. Where new and material evidence is received or there is a change in law, rules or other precedents which would permit findings favorable to the applicant, licensee, or alleged violator, the administrative law judge, at the officer's discretion, may remand the case to the appropriate section of the department for a revised determination. Unless the remand is requested by the applicant, licensee, or alleged violator, the order of remand shall inform the individual that any objection to the remand shall be filed with the administrative law judge within ten days from the date of such order. Absent any objections by the individual, consent of such individual will be presumed.

641—173.6(17A) Consolidated hearing. When request for a hearing is made and there is another request for a hearing pending with respect to the same party, the administrative law judge may conduct a consolidated hearing on such pending requests for hearing if practical. When a consolidated hearing

is held, a single record of the proceedings shall be made and the evidence introduced in one case may be considered as introduced in the other, and a separate or consolidated decision shall be made as appropriate.

641—173.7(17A) Change of time and place for hearing. The administrative law judge may change the time and place for the hearing, either on the administrative law judge's own motion or for good cause shown by a party. The administrative law judge may adjourn or postpone the hearing, or may reopen the hearing for the receipt of additional evidence at any time prior to the mailing of notice to the party of the decision in the case. Notice shall be given to the parties by order of any change in the time or place of hearing or an adjournment or a reopening of the hearing.

641—173.8(17A) Subpoenas. When reasonably necessary for the full presentation of a case, the administrative law judge or the director may, either upon the director's own motion or upon the request of a party, issue subpoenas for the attendance and testimony of witnesses and for the production of books, records, correspondence, papers, and other documents which are relevant and material to any matter in issue at the hearing. Parties who desire the issuance of a subpoena shall file with the administrative law judge or the director a written request therefor, designating the witnesses or documents to be produced, and describing the address or location thereof.

The responsibility for having the subpoena served by a peace officer or otherwise shall be upon the party who requests the issuance of the subpoena. The party who requests the subpoena shall pay the cost of having the subpoena served and the cost of the witness fees and travel for the witness. A witness who appears because of subpoena shall receive a daily fee of \$3 and the state rate per mile travel expense. A witness shall not receive mileage for travel when the witness travels in a vehicle for which another witness is receiving mileage.

641—173.9(17A) Right to appear and present evidence. The applicant, licensee, or alleged violator shall have the right to appear in person or by attorney before the administrative law judge and present evidence and contentions. In regard to any applicant, licensee or alleged violator unwilling, unable, or waiving the right to appear personally or by attorney before the administrative law judge, it shall not be required that an oral hearing be conducted although the administrative law judge may deem it necessary to conduct an oral hearing. In the event the applicant, licensee or alleged violator does not appear and good cause is not demonstrated, the administrative law judge may issue findings of fact and a proposed decision.

173.9(1) Unless required for the disposition of ex parte matters specifically authorized by statute, the administrative law judge shall not communicate directly or indirectly with any party or representative of the party, nor shall such party or representative of the party communicate directly or indirectly with the administrative law judge concerning any issues of fact or law in a contested case unless:

a. Each party or representative of the party is given written notice of the communication. Such notice shall contain a summary of the communication, if oral, or a copy of the communication, if written, and the time, place and means of such communication;

b. After such notice all parties shall have the right, upon written demand, to respond to such communication, including the right to be present and heard if the communication is oral and not completed. If the communication is written, or if oral and completed, any other person has the additional right to a special hearing for the purpose of responding to the ex parte communication.

173.9(2) Any ex parte communication prohibited by Iowa Code section 17A.17, subsections 1 and 2, received by an administrative law judge shall be included in the record. If the prohibited ex parte communication is received orally, the administrative law judge shall summarize the communication and include it in the record. Any party to the contested case shall be immediately notified of the communication and given a reasonable opportunity to respond including, if necessary, a special hearing.

This rule is intended to implement Iowa Code section 17A.17.

641—173.10(17A) Conduct of hearing. A hearing shall be conducted by a qualified administrative law judge who, among other things, shall:

- 173.10(1)** Open the record and receive appearances.
- 173.10(2)** Administer oaths, and issue subpoenas.
- 173.10(3)** Enter the notice of hearing into the record.
- 173.10(4)** Receive testimony and exhibits presented by the parties.
- 173.10(5)** At the administrative law judge's discretion, interrogate witnesses.
- 173.10(6)** Rule on objections and motions.
- 173.10(7)** Close the hearing.
- 173.10(8)** Issue an order containing findings of fact and conclusions of law.

Evidentiary proceedings shall be oral and open to the public except if the subject is confidential and shall be recorded either by mechanical means or by certified shorthand reporters. Parties requesting that the hearing be recorded by certified shorthand reporters shall bear the appropriate costs. An opportunity shall be afforded to the parties to respond and present evidence and argument on all issues involved and to be represented by counsel at their own expense. If the administrative law judge believes that there is relevant and material evidence available which has not been presented at the hearing, the administrative law judge may adjourn the hearing or, at any time prior to the mailing of notice of the decision, reopen the hearing for the receipt of such evidence. The administrative law judge may exclude any person from the hearing for misbehavior that obstructs the hearing.

641—173.11(17A) Order of hearing. The hearing shall be conducted in accordance with the following procedure unless otherwise directed by the administrative law judge.

- 173.11(1)** The department may make an opening statement.
- 173.11(2)** The applicant, licensee, or alleged violator may make an opening statement personally or by an attorney.
- 173.11(3)** The department shall present its evidence first at the hearing giving the evidence and reasons for issuing the notice of violation, denying the application, suspending, or revoking the license.
- 173.11(4)** The applicant, licensee, or alleged violator may then present such evidence as will support its position.
- 173.11(5)** Both the department and the applicant, licensee, or alleged violator may cross-examine witnesses.
- 173.11(6)** Rebuttal and surrebuttal evidence may be permitted at the discretion of the administrative law judge.
- 173.11(7)** The department may make a closing statement.
- 173.11(8)** The applicant, licensee, or alleged violator may make a closing statement.

641—173.12(17A) Discovery and depositions. Discovery procedures may be utilized as permitted under the procedures of the Iowa rules of civil procedure. Depositions taken in accordance with the Iowa rules of civil procedure may be used as evidence with the approval of the administrative law judge.

641—173.13(17A) Witnesses. Witnesses at the hearing shall testify under oath. Witnesses shall be subject to examination by the administrative law judge and the parties or their attorney. If the administrative law judge conducts the examination of a witness, the administrative law judge may allow the parties to suggest matters as to which they desire the witness to be questioned, and the administrative law judge shall question the witness with respect to such matters if they are relevant and material to any issue pending for decision before the administrative law judge. Upon the administrative law judge's own motion, or the motion of any party, the administrative law judge may order in its discretion the sequestration of witnesses to be called in any proceeding.

641—173.14(17A) Oral argument and written allegations. The parties shall file briefs or other written statements or allegations as to facts or law requested by the administrative law judge. Where there is more than one party to the hearing, copies of any brief or other written statement shall be filed in sufficient number that they may be made available to any party.

641—173.15(17A) Dismissal for cause. The administrative law judge may dismiss a hearing request, either entirely or as any stated issue, under any of the following circumstances.

173.15(1) *Res judicata.* Where there has been a previous determination or decision by the department with respect to the same party on the same facts pertinent to the same issue or issues which has become final.

173.15(2) *No right to hearing.* Where the party requesting a hearing is not a proper party or does not otherwise have a right to a hearing.

173.15(3) *Hearing request not timely filed.* Where the party has failed to file a hearing request within the time period required by statute or rule.

641—173.16(17A) Administrative appeal.

173.16(1) When the administrative law judge makes a proposed decision or order, that decision or order then becomes the final decision or order of the department without further proceedings ten days after mailing of the proposed decision or order to the person to whom the notice of hearing was sent. The decision or order shall be mailed by certified mail, return receipt requested, or delivered by personal service.

173.16(2) Any notice of appeal to the director or appropriate licensing board for review of the proposed decision or order of the administrative law judge must be made in writing mailed to the director or chairperson of the licensing board by certified mail, return receipt requested, or by personal service within ten days after the mailing of the proposed decision or order to the aggrieved party. A copy of the notice of appeal shall also be mailed to the administrative law judge at the Department of Inspections and Appeals, Lucas State Office Building, Des Moines, Iowa 50319-0075. The notice of appeal shall state the reason(s) for appeal.

173.16(3) Upon receipt of notice of appeal, the administrative law judge shall prepare the record of the hearing for submission to the director or appropriate licensing board. The record shall include the following:

- a. All pleadings, motions and rulings;
- b. All evidence received or considered and all other submissions by recording or transcript;
- c. A statement of all matters officially noticed;
- d. All questions and offers of proof, objections, and rulings thereon;
- e. All proposed findings and exceptions;
- f. The order of the administrative law judge.

173.16(4) A decision or order of the director or appropriate licensing board becomes a final order upon mailing by certified mail, return receipt requested, or by personal service.

This rule is intended to implement Iowa Code section 10A.202 and chapter 17A.

641—173.17(17A) Application for rehearing. The filing of an application for a rehearing is not necessary to exhaust administrative remedies. Appeal to the director, appropriate licensing board, or to the district court as provided in Iowa Code section 17A.19 may be made without filing an application for a rehearing.

641—173.18(17A) Judicial review. Unless otherwise provided by statute, any petition for judicial review of a decision or order must be filed in the district court within 30 days after the decision or order becomes final. A decision or order of an administrative law judge shall become final ten days after it is issued. A decision of the director or a licensing board shall become final upon issuance.

641—173.19(272C) Disciplinary hearings—fees and costs.

173.19(1) Definitions. As used in this chapter in relation to a formal disciplinary action filed by a board against a licensee:

“*Deposition*” means the testimony of a person pursuant to subpoena or at the request of the state of Iowa, taken in a setting other than a hearing.

“*Expenses*” means costs incurred by persons appearing pursuant to subpoena or at the request of the state of Iowa, for purposes of providing testimony on the part of the state of Iowa in a hearing or other official proceeding and shall include mileage reimbursement at the rate specified in Iowa Code section 70A.9 or, if commercial air or ground transportation is used, the actual cost of transportation to and from the proceeding. Also included are actual costs incurred for meals and necessary lodging.

“*Medical examination fees*” means actual costs incurred by the board in a physical, mental, chemical abuse or other impairment-related examination or evaluation of a licensee when the examination or evaluation is conducted pursuant to an order of the board.

“*Transcript*” means a printed verbatim reproduction of everything said on the record during a hearing or other official proceeding.

“*Witness fees*” means compensation paid by the board to persons appearing pursuant to subpoena or at the request of the state of Iowa, for purposes of providing testimony on the part of the state of Iowa. For the purposes of this rule compensation shall be the same as outlined in Iowa Code section 622.69 or 622.72 as the case may be.

173.19(2) Pursuant to Iowa Code section 272C.6, a board created pursuant to Iowa Code chapter 135E, 147 or 154A may charge a fee not to exceed \$75 for conducting a disciplinary hearing which results in disciplinary action taken against the licensee by the board. In addition to the fee, the board may recover from the licensee costs for the following procedures and personnel:

- a. Transcript.
- b. Witness fees and expenses.
- c. Depositions.
- d. Medical examination fees incurred relating to a person licensed under Iowa Code chapter 135E, 147 or 154A.

173.19(3) Fees and costs assessed by a board pursuant to subrule 173.19(2) shall be calculated by the board executive director, executive secretary or administrator, as the case may be, and shall be entered as part of the board’s final disciplinary order. The board’s final disciplinary order shall specify the time period in which the fees and costs shall be paid by the licensee.

173.19(4) Rescinded IAB 3/30/94, effective 5/4/94.

173.19(5) Failure of a licensee to pay the fees and costs assessed herein in the time specified in the board’s final disciplinary order shall constitute a violation of a lawful order of the board.

This rule is intended to implement Iowa Code section 272C.6.

641—173.20(272C) Allocation of disciplinary fees and costs.

173.20(1) Definitions.

- a. For purposes of this rule, the term “department” means the department of public health.
- b. For purposes of this rule, the term “board(s)” shall include all professional licensing boards created under Iowa Code chapter 147 or under the administrative authority of the department, including the board of dental examiners, the board of nursing, the board of medical examiners, and the board of pharmacy examiners.

173.20(2) All hearing fees and costs assessed by the boards shall be paid directly to the department and shall be held in a separate fund within the department.

173.20(3) The department shall distribute moneys held in this fund during the fiscal year in which those moneys are paid to the department. Distributions from the fund shall be made upon the request of a board and in the discretion of the department. A distribution received by a board under this chapter shall be used only for expenditures related to disciplinary hearings.

173.20(4) The department shall consider the following factors in exercising its discretion as to whether to distribute funds to a requesting board:

- a. The remaining funds in the board's appropriation for disciplinary hearings in that fiscal year.
- b. The number of disciplinary hearings the board has scheduled for the remainder of that fiscal year; the nature and seriousness of those hearings; and the public health, safety, and welfare interests implicated by those hearings.
- c. Whether the board has adopted and implemented hearing cost recovery rules.

173.20(5) The department shall, within 45 days from the end of the fiscal year, distribute to the boards the remaining amount of fees and costs paid to the department during the prior fiscal year. The department shall distribute to each board a percentage of the remaining fees and costs that is equal to the percentage of that board's total budget in relation to the departmentwide total budget for all professional licensing boards governed by this chapter.

173.20(6) The fees and costs allocated back to the individual professional licensing boards shall be considered repayment receipts as defined in Iowa Code section 8.2. The fees and costs allocated back to each board shall be applied to the costs incurred by the board for prosecution of contested cases which could result in disciplinary action.

This rule is intended to implement Iowa Code subsection 272C.6(6), second unnumbered paragraph.

[Filed 3/18/76, Notice 2/9/76—published 4/5/76, effective 5/10/76]

[Filed 4/14/78, Notice 12/28/77—published 5/3/78, effective 6/7/78]

[Filed emergency 7/29/83—published 8/17/83, effective 7/29/83]

[Filed emergency 7/1/86—published 7/16/86, effective 7/1/86]*

[Filed emergency 9/19/86—published 10/8/86, effective 9/19/86]

[Filed emergency 7/10/87—published 7/29/87, effective 7/10/87]

[Filed 9/14/92, Notice 7/8/92—published 9/30/92, effective 11/4/92]

[Filed 3/4/94, Notice 1/5/94—published 3/30/94, effective 5/4/94]

*See IAB, Inspections and Appeals Department.